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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

MAKAH INDIAN TRIBE,

Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT STATE OF WASHINGTON'S BRIEF IN OPPOSITION

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BRIEF OF RESPONDENT, STATE OF WASHINGTON, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The respondent, State of Washington, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Ninth Circuit decision entered in this case on August 27, 1990. The Ninth Circuit opinion is reported at 913 F.2d 576 (Pet. App. A), the underlying opinion

(amended) of the district court for the District of Oregon is reported at 122 F.R.D. 571 (Pet. App. C).

STATEMENT OF THE CASE

Facts of the case are fairly presented in the opinions of the district court for the District of Oregon and the Ninth Circuit Court of Appeals (Pet. App. A and C respectively).

REASONS WHY THE PETITION SHOULD BE DENIED

1. The petitioner endeavors to present issues which they did not raise with either the district court or the Ninth Circuit Court of Appeals.

In an effort to entice Supreme Court review, the petitioner, Makah Indian Tribe (hereinafter Makahs) have endeavored to create an issue which they did not raise with either the district court or the Ninth Circuit Court of Appeals. In their petition for Writ of

Certiorari, the Makahs contend that their "interest" in the case should have been explicitly considered as a part of the test for determining whether their motion to intervene was timely.

The district court's analysis of the timeliness element of Fed. R. Civ. P. 24(a) and the Ninth Circuit's review of the timeliness decision, focused on three factors: (1) the stage of the proceeding; (2) prejudice to the existing parties; and (3) the reason for and length of delay. 913 F.2d 576, 588-89 (Pet. App. A-48 through A-57). The Makahs now contend that the court's timeliness analysis should have explicitly addressed a fourth factor; that of the Makahs' interest in the case.

Generally the United States Supreme Court does not consider questions not

raised in the district court and the court of appeals. Ramsey v. United Mine Workers, 401 U.S. 302, 312 (1971); Neely v. Eby Construction Co., 386 U.S. 317, 330 (1967); Delta Airlines v. August, 450 U.S. 346, 362 (1981); Adickes v. Kress and Co., 398 U.S. 144, 147 n.2 (1970); United States v. Ortiz, 422 U.S. 891, 898 (1975).

In the case of United States v. Ortiz, 422 U.S. 891 (1975), the petitioner government claimed that the Ninth Circuit Court of Appeals erred in voiding an automobile search at a fixed checkpoint and consequently reversing a conviction for transporting illegal aliens. The Ninth Circuit's decision in Ortiz, was based on its earlier unreported case of United States v. Bowen, 500 F.2d 960 (CA 9 1974) wherein the court held for the first time that

probable cause was required for all vehicle searches near the border, whether conducted by roving patrols or at fixed checkpoints.

In its petition the government claimed error because the search had occurred before the decision in Bowen. The Supreme Court refused to consider this issue because it was raised for the first time in the government's Petition for Certiorari. The Ortiz court stated:

> Examination of the government's brief in the Ninth Circuit indicates that it did not raise this question below. On the contrary, it represented to the court that the decision in Bowen would be "determinative of the issues in this case." We therefore decline to consider this issue, which was raised for the first time in the petition for certiorari.

United States v. Ortiz, 422 U.S. 891, 898 (1975).

The circumstances in the present case are similar to those in Bowen. For here, not only did the Makahs fail to argue for application of this "fourth factor" at either the district court or the Ninth Circuit, the Makahs in fact tendered to the court the very three-prong analysis they now condemn as being too narrow.

In their opening brief to the Ninth Circuit the Makahs stated:

> This court has adopted three criteria for determining timeliness: (1) state of the proceedings; (2) prejudice to other parties; and (3) reason for and length of delay.

(Brief of Appellant Makah Indian Tribe before the Ninth Circuit Court of Appeals, June 26, 1989, p. 28.) In their Ninth Circuit brief the Makahs limit themselves to arguing why, in their view, the district court had

misapplied the three-prong analysis. Nowhere in their brief do the Makahs argue that there is a fourth element or criteria which the court should have applied. The reply brief of the appellant Makah Indian Tribe before the Ninth Circuit Court of Appeals is similarly void of any argument or suggestion that a fourth criteria should have been applied in determining the timeliness of their motion to intervene. (Reply Brief of Appellant Makah Indian Tribe before the Ninth Circuit Court of Appeals, November 22, 1989.) The Makahs' Petition for Rehearing and suggestion of appropriateness of rehearing en banc likewise contains no allegation or argument that the district court erred by not explicitly considering this fourth factor. (Appellant Makah Indian Tribe's Petition

for Rehearing and suggestion of appropriateness of rehearing en banc before the Ninth Circuit, September 25, 1990.)

The Makahs are attempting to argue this issue for the first time on review. They should not be allowed to do so.

2. The Ninth Circuit correctly applied the prevailing standard in affirming the district court's decision that the Makahs' Motion to intervene was not timely.

In the case of NAACP v. New York, 413 U.S. 345 (1973), this Court confirmed that timeliness is a primary condition which must be satisfied prior to looking to the other elements of either rule 24(a) or 24(b). This Court there stated:

> [I]t is at once apparent, from the initial words of both rule 24(a) and rule 24(b), that the application must be "timely." If it is untimely, intervention must be denied. Thus, the court where the

> action is pending must first be satisfied as to timeliness.

NAACP v. New York, 413 U.S. 345, 367 (1973).

In NAACP v. New York, this court further held that timeliness is to be determined by the court in the exercise of its sound discretion from all of the circumstances, and unless that discretion was abused, the court's ruling on timeliness will not be disturbed on review. Id. at 367.

The court's holding in NAACP does not establish a fixed list of criteria or circumstances by which timeliness should be adjudged. On the contrary, the opinion clearly leaves it to the discretion of the district court judge to determine from the circumstances there relevant whether a motion to intervene is timely.

In the present case the district court carefully reviewed the relevant circumstances on the question of whether the Makahs' petition was timely. In the exercise of its sound discretion, the court "denied the Makah motion to intervene as untimely, prejudicial to the parties and inappropriate because the Makah fishery is directly regulated by the PFMC . . ." (Pet. App. A-47).

On review the Ninth Circuit reviewed the district court's analysis of each of the three elements in the test for timeliness; the very test advanced by the Makahs. Based on that review the Ninth Circuit concluded that the district court had not abused its discretion in finding the motion to intervene untimely and consequently affirmed that determination.

This Court's decision in NAACP v. New York directs the Ninth Circuit to employ precisely the process which it employed here. A touchstone of that process is appropriate deference to the determination of the district court in the sound exercise of its discretion. NAACP v. New York, 413 U.S. 345, 367. In the case of Culbreath v. Dukakis, 630 F.2d 15 (1st Cir. 1980), one of the cases cited by the Makahs, the court held that even though the district court had employed a less comprehensive test than the First Circuit Court would have employed (i.e., one that did not expressly consider prejudice to the petitioner), it did not abuse its discretion in denying intervention as untimely. Id. at 24.

3. Even if the "Makahs' interest" were an essential criteria in evaluating the timeliness of the Makahs' motion to intervene, the district court did consider the Makahs' interest in reaching its decision.

The district court devoted considerable attention and nearly 10 pages of its amended opinion to an evaluation of the interest of the Makah Tribe. (Pet. App. C-20 through C-29.) In evaluating the Makahs' interest, the court noted that such evaluation of the applicant's interest is:

> [B]asically a threshold test because the criteria of practical harm to the applicant and the adequacy of representation by others are better suited to the task of limiting extension of the right to intervene.

(Pet. App. C-20.)

After carefully reviewing the interest of the Makah Tribe, the district court concluded:

> Thus, I find that the interest the Makah Tribe seeks to

> protect is the indirect effect of this court's actions. When I consider that interest in light of the scope of this action, the treaty fishing rights on the Columbia River, I must find that the interest to the Makah Tribe in this action does not pass the threshold test.

(Pet. App. C-29.)

Furthermore the district court went further and evaluated the Makahs' motion under Fed. R. Civ. P. 24 as if it were timely filed. Although the Ninth Circuit did not find it necessary to fully review this analysis, the district court fully and carefully analyzed the Makahs' motion to intervene as if it had been timely filed. (Pet. App. C-20 through C-36 and passim.) The district court concluded that even if the motion had been timely, the Makahs could not satisfy the other requisites for

intervention. (Pet. App. C-20 through C-36.)

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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